

from the date the default notices were issued, would have the full benefit of that 30 day period in order to make its payment.

Instead, on May 24th NPS received two versions (one for each of the Contracts) of the following letter, which did not state the amount NPS had to pay; did not attach any account reconciliations; and did not provide any inkling of what Procaps' actual expectations were with respect to what NPS needed to do to "cure" the defaults:

May 17th, 2005

National Paintball Supply, Inc.
570 Mantua Blvd.
Sewell, N.J. 08080

Attention: Eugenio Postorivo

Dear Sirs,

Re: Products Supply Agreement entered into by Procaps Encapsulation Inc. and National Paintball Supply, Inc. as assigned to Procaps, L.P. (the "Agreement")

Please treat this letter as notice of your default under the Agreement, for failure to pay amounts due and owing to Procaps within the time period during which such payment is to be made, and for which you have thirty (30) days from the date hereof to cure such default.

As provided in invoices sent to you, interest accrues on the amounts due and owing at the rate of 18% per annum and shall continue at such rate until payment has been received.

*Yours very truly,
PROCAPS, L.P.*

Per:
Richmond Italia
President

Ex. NPS-7; see also Ex. NPS-8 (default notice for the Goggles Contract). That Procaps mailed (but did not email or fax) the above letter, devoid of any detail whatsoever about Procaps' perception of NPS' payment obligations, is a testament to Procaps' bad faith in seeking to concoct the incurable default.

6. ICC's/Procaps' Bad Faith During The "Cure" Period And Thereafter

The worst examples of ICC's and Procaps' bad faith were in the time period following Procaps' issuance of the May 17th default notices. ICC's and Procaps' own documents and their representatives' statements in this period demonstrate that – far from being committed to seeing the contractual relationship continue, as Tafler so memorably testified – the management of ICC and Procaps was

determined to terminate the Contracts *regardless of what NPS did*, and had already made plans, even before the “cure” period mandated by the Contracts had expired, to fill the void left by the impending termination of the Contracts.

Had Tafler truly believed that no one at Procaps wanted to see the Contracts with NPS terminated, he must not have actually spoken to anyone in the management team at Procaps. On May 31st, Craig Miller wrote an email to Zbid Migos which answers the question of whether Procaps’ management truly wished to see NPS “cure” the default notices:

-----Original Message-----

From: "craig"
Date: Tue, 31 May 2005 15:18:43
To:"zbid"
Subject: Hamburg, NPS, and timing

Lastly, a question regarding our timing for this call: Regarding Procaps' very strained relations with NPS at this time (millions of dollars in overdue balances, and still NO REPLY to our registered letter, which put them on official notice of contractual breach, with only ~ 2 weeks left to respond)... So, do you think it would possibly be better to wait a couple of weeks, based on the idea that, if NPS does not remedy their huge balances due in that time, then our supply contacts are null and void, enabling us to start fresh on a non-exclusive basis, which is what we've always wanted... Your thoughts?

Ex. NPS-490. Indeed, Miller was the most vocal member of Procaps’ management team advocating the termination of the Contracts, at least based on the email correspondence. On June 4th, he emailed the Italias and Molyneux in this regard:

From: craig [mailto:craig@procaps.com]
Sent: Friday, June 03, 2005 11:17 PM
To: Richard Italia; Richmond Italia; Rob Molyneux - Imperial
Subject: Newer PMI + NPS rumor

Gents,
The newest word on the street is that NPS would merely take over PMI's debt to RP/Cardinal Health, and PMI's owner's would retain hefty salaries.
This rumor has had phenomenal hang-time and therefore should NOT be ignored.

PLEASE let us remain strong and let us deliver MAXIMUM pressure to cause our supply contract with them to become null and void, so that we can conduct business with NPS on a non exclusive basis, on terms dictated by US instead of Campo!

May the Force be with us !!!!!
Craig

Ex. NPS-60.

At the same time that Miller was begging his bosses to terminate the Contracts, NPS was informing Procaps that it was going to take all necessary steps to ensure that the Contracts would *not* be

terminated. Tr. 9/28 at 6-11 (Campo); Tr. 3/21 at 87-96 (G. Postorivo). However, consistent with Procaps' internal correspondence, Richmond Italia was telling Gino Postorivo and John Campo during this same time frame that it did not matter whether NPS "cured" the defaults because Procaps was going to terminate the Contracts *under any circumstances*. Tr. 9/28 at 6-11 (Campo); Tr. 3/21 at 80-81 (G. Postorivo).

Meanwhile, contrary to Molyneux's testimony that Procaps had no "Plan B" for what it would do in the event the Contracts were terminated, see Tr. 3/24 at 50 (Molyneux), the evidence reveals that Procaps was busy preparing for what its management team had "always wanted," *i.e.*, a scenario in which the Contracts were terminated and Procaps was free to sell to whomever it chose. On May 26th, Zbid Migos, Procaps' other Vice President, and Tafler exchanged emails making plans to immediately hire a "temp" who could enter NPS' customers into Procaps' mailing list. Ex. NPS-1567.²¹ At the time, Procaps had fewer than 15 customers. Tr. 9/27 at 142 (Miller). It simply does not make sense that Procaps would have been preparing a routine "mailer," as Miller claimed in attempting to explain away the email. Tr. 9/27 at 142-145 (Miller). After all, Procaps had no reason to have direct contact with NPS' customers, because NPS had the exclusive right to distribute Procaps' signature products to these customers. See generally, Exs. NPS-3, NPS-5. Thus, the only plausible explanation for the immediate need to hire a temporary employee to input NPS' customers into a Procaps customer list is that Procaps, just two days after NPS had received the default notices, had already made its decision that it was terminating the Contracts *regardless of what NPS did to cure*. Having failed in its efforts to acquire

²¹ Other than NPS' drop ship customers, Procaps would not have had access to the names, addresses and contact information of NPS' customers. Tr. 3/23 at 18 (J. Postorivo). Curiously, after Procaps terminated the Contracts, among the recipients of Procaps' first post-termination mailers were customers whose names and contact information must have come from NPS, based on the fact that the customers either had not purchased any paintball-related supplies in years or received the mailers at an old address. Tr. 9/25 at 87-91 (J. Postorivo). One credible explanation for how Procaps came into possession of NPS' customer list is that Chris Black, an IT employee of Procaps, stole the list from NPS. This would explain why PEI, AirTech, the Italias and Vance agreed to indemnify ICC with respect to Black's actions "which relate to the computer system of [NPS]." Ex. NPS-2166. At a minimum, this explanation is far more credible than Richmond Italia's testimony that the genesis of this indemnity agreement was a comment overheard by Truant about Black having very briefly, years earlier, seen some unidentified NPS information on a "guest" computer he used while at NPS' headquarters. Tr. 9/7 at 41-45 (Richmond Italia).

NPS, Procaps had moved on to Plan B as identified by ICC back in November 2004 which was to go into direct competition with NPS. Ex. NPS-32.

From late May through mid-June, although the “cure” period – even calculated, as Procaps’ measured it, from the date the default notices were sent – had yet to elapse, the evidence shows that Procaps was hard at work planning its distribution strategy once the formality of terminating the Contracts had been accomplished. In late May, Procaps dispatched Migos and Richmond Italia to Europe to gauge the interest of Procaps’ former European sub-distributors, who it had partnered with in the period of time prior to the sale of Procaps’ European operations to NPS, in once again doing business with Procaps after Procaps terminated the Contracts. Ex. NPS-1552; Tr. 9/8 at 107-115 (Richmond Italia).²² Migos visited with these sub-distributors and, not surprisingly, within months of the termination Procaps’ main European customers were mostly the same sub-distributors that it had previously done business with before NPS bought Procaps’ European distribution operations. Ex. NPS-2187; Tr. 9/27 at 161-168 (Miller).

On June 16th, ICC dispatched David Littlejohn, then a Vice President of ICC, to Procaps’ headquarters in order put together a sales and marketing plan for Procaps after the Contracts were terminated. Ex. NPS-556. On June 24th, Littlejohn circulated an email summarizing what was discussed at the June 16th meeting:

²² Richmond Italia denied that this was the purpose for the trip. Tr. 9/8 at 107-115 (Richmond Italia) Once again, however, his testimony is not credible. Although, theoretically, the purpose of the trip could have been to begin Procaps’ initial preparations to re-enter the European market in March 2006, when Procaps was permitted to do so under the terms of the Paintball Contract, the evidence demonstrates that the trip was a direct result of Procaps’ decision to terminate the Contracts by launching the default notices two weeks earlier. Italia wrote an email to Molyneux, Richard Italia, Truant and Miller on June 4th, while he was still in Europe, advising about sales prospects and indicating “I can start selling . . . as early as next week if legal is ok with it.” Ex. NPS-61.

From: David Littlejohn
Sent: Friday, June 24, 2005 02:47:07 PM
To: Richmond Italia (E-mail), Richmond Italia (E-mail 2)
CC: Ed Truant (E-mail), Rob Molyneux (E-mail), Howard Tafler (E-mail), Craig Miller (E-mail), Zbid Migos (E-mail), Stephen Lister (E-mail), Stephen Lister (E-mail), Jeffrey Rosenthal (E-mail), Jonathan Sherman (E-mail), mark.shuster@comcast.net
Subject: Meeting Follow-Up

Dear Richmond,

This is a follow-up note to our recent visit to Montreal. During our sessions, we collectively decided on an action plan for the remainder of 2005. Here are the notes regarding the various steps. Please review these steps and assign/reassign responsibilities and due dates for each one.

TRADITIONAL

1. Partner with Max (250 m) - guarantee 150 mm if we give him everything other than DraXXus.
2. Hire Steve Baldwin in England (controls - collection of receivables) (200 mm)
- bonus based on profitability
3. Hire a controller in UK
4. Hire Adrian Saunders
5. Ship and bill container load customers (ex Max) directly - Stephen to get commission
6. Create distribution plan - broadline (Craig/ Howard) - Tippman partnership (Zbid)

TRADITIONAL USA

1. Develop a sales team (Gary Shows/Danny Williamson/Pat O'Toole) - new distribution - template from other warehouses
2. Partner with 1) PEVS; 2) American Paintball; 3) Bobby Weeks - OEM business only.
3. Chicago/Texas/Philly - Future warehouses (based on model developed in 1)
4. Develop Financial Model for Distribution Plan (Craig/Howard) A/R management
- March 2006
- Develop Procaps brand over time
5. Reassess Marketing Budget in light of new distribution strategy

Ex. NPS-1489. Of course, virtually every aspect of the plan put in place on June 16th was carried out by Procaps after it terminated the Contracts. Tr. 9/27 at 202-209 (Miller).

During the “cure” period, Procaps was also projecting how it would replace the roughly 2.1 billion paintballs per year that it sold to NPS. Tr. 9/26 at 56-57 (J. Postorivo). Procaps’ own documents demonstrate its confidence that, upon terminating the Contracts, it would have little problem replacing sales to NPS with sales to other third parties. First, Procaps was confident that it would be able to target NPS’ drop ship customers which, according to Miller, accounted for approximately 30%-40% of NPS’ overall 2.1 billion in paintball sales. Ex. NPS-1549. Richmond Italia forecasted the following sales by Procaps in Europe, based on one scenario in which Procaps would still “permit” NPS to be the exclusive DraXXus distributor, and another scenario in which Procaps decided to “cut them [referring to NPS] off cold”:

From: richmond
Sent: Saturday, June 4, 2005 11:51:57 AM
To: Rob Molyneux
CC: Richard Italia, Ed Truant, Craig Miller
Subject: Europe

Thank you for the motivation,
2006 forecast for europe- non nps business.
100% sure p.o.'S we can get
Ussr 50 mil
Uk 100 mil
Spain 25 mil
Norway 10 mil
Netherlands 15 mil
All others will be handled by maxs 150 mil

Total of 350 mil and this is based on nps still being our draxxas distributor,
numbers will increase if we cut them off cold.
I can start selling to all of the above as early as next week if legal is ok
with it.
Just a note nps will not do 350 with us this year. With my above forecast I
expect nps to still do 200 mil in europe with draxxus for a total of 550, where
as they r on track to do only 300 this year.
This strategy if achieved will almost double our euro sales and move us one step
further from nps.

Ex. NPS-61.

Similarly, Miller predicted the following sales by Procaps in the U.S. market:

From: Craig Miller
Sent: Wednesday, June 15, 2005 05:10:34 PM
To: Howard Tafler
CC: Zbid Migos, Richard Italia, Richmond Italia
Subject: New Sales Opportunities, alphabetically

American Paintball Supply has reported excellent reception of their new "ORIGIN" brands, and now predicts that their sales will likely be double the contract amount of 100 million paintballs, and possibly as high as triple. American is also selling reasonable quantities of our XBall.

Cousins and Pev's Paintball merger is moving forward, and a new Procaps-owned "Podium Series" brand is being prepared for a major launch at October's World Cup event. Paul Sattler's distribution experience with Diablo Direct, followed by the fast-start of XBall Direct, offers promise of strong potential, with reasonable expectations of over 500 million balls. The new entity will be in a position to sell Procaps' "XBall" brand as well.

Exotic Sportz exclusive "Fireball" brand is going strong as they enter their "Big Game" event season. We have P.O.s on hand for about \$215,000 (USD) representing over 15 million balls, with annual expectations of about 30 million by year end.

Hollywood Sports Park's primary goal was to achieve an investment arrangement with us which would secure all of their park business, and all of the paint sales of a new distribution venture they intend to develop. In the absence of a deal with them, we can only hope for a portion of their private label business - perhaps 20% at best. Giovanni has repeatedly promised to send the image files for their new packaging, yet it is still not here. This kind of delay is actually typical with them. It's difficult to determine their actual expected volume since their distribution concept is new and unproven, and they tend to speak in wildly optimistic terms. I conservatively anticipate 30 - 50 million balls.